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No. 04-47

IN THE
Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,
Petitioner,
v.
CHRIS BARBER, CLAUDETTE BARBER, AND ALLIED WASTE INDUSTRIES, INC.
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE AMERICAN TORT REFORM ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), the American Tort Reform Association and the National Association of Manufacturers request leave to file the accompanying brief as *amici curiae* in support of the Petition for a Writ of Certiorari.[1] While the

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[1] In accordance with Rule 37.6, *proposed amici* state that no counsel for either party has authored this brief in whole or in part, and no person

Petitioner has consented to the filing of this brief, Respondents' counsel has withheld consent, necessitating the filing of this motion.[2]

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before this Court that have addressed important liability issues.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

This case is of interest to proposed *amici* because it provides a sound vehicle for this Court to address the improper use of wealth evidence in the assessment of punitive damages awards. In the instant case, the $9.6 billion net worth of petitioner-defendant Union Pacific Railroad Co. was the ***only*** evidence offered during the punitive damages phase of trial on non-fatal personal injury negligence claims arising out of

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or entity, other than the proposed *amici*, has made a monetary contribution to the preparation or submission of this brief.

[2] Petitioner's letter of consent has been lodged with the Clerk of the Court.

a railroad crossing accident. Thus, this case crystallizes the ongoing debate about the constitutional due process issue presented by the use of evidence of a defendant's wealth in assessing the amount of punitive damages.

Distinguished judges and scholars have grappled for years with the problems and perceived benefits created by this so-called "traditional" measure of punitive awards. This issue is only becoming more pressing in light of modern mass tort litigation and punitive damages practice and their effects on consumers and businesses throughout the United States. This case provides a unique opportunity for this Court to provide clear guidelines on an important issue – the extent to which evidence of a corporate defendant's wealth can be used to measure an award of punitive damages without violating constitutional due process guarantees.

Particularly in light of the emphasis on the petitioner-defendant's wealth in this case, it is important for this Court to grant certiorari to address the failure by the courts below to comply with this Court's directives regarding the improper use of extraterritorial evidence to support punitive awards in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). Both the trial court and the Arkansas Supreme Court relied on Union Pacific's alleged nationwide policies to put profits over safety when upholding the punitive award. This is in direct contravention of this Court's ruling in *Campbell* that "a State cannot punish a defendant for conduct that may have been lawful where it occurred. Nor does the State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of its jurisdiction." 538 U.S. at 421-22.

This Court has expressed heightened concern about the use of wealth evidence in cases where, as here, "the decisionmaker is presented . . .with evidence that has little bear-

ing as to the amount of punitive damages that should be awarded." *Id.* at 418 (noting in such cases that strong guidelines are needed to "aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.").

The proposed *amici* are active in the business and manufacturing communities and their members are the primary victims of excessive punitive damages awards. They, and their members, have a unique understanding of the impact of excessive punitive damage awards inflated by the ill-advised use of wealth evidence.

For the foregoing reasons, the proposed *amici* are well-suited to bring these matters to the Court's attention. Accordingly, ATRA and the NAM respectfully request that the Court grant its motion for leave to file the attached brief.

Respectfully submitted,

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Dated: September 10, 2004

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BRIEF *AMICI CURIAE* OF AMERICAN TORT REFORM ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 busi-

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[1] *Amici's* motion for leave to file this brief *amici curiae* is filed simultaneously with the brief. No counsel for either party has authored this brief in whole or in part, and no person or entity other than the *amici* has made a monetary contribution to the preparation or submission of this brief.

nesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

This case is of interest to *amici* because it provides a sound vehicle for this Court to address the improper use of wealth evidence in the assessment of punitive damages awards. The members of *amici* are active in the business and manufacturing communities and their members are the primary victims of excessive punitive damages awards. Ultimately, the impact of runaway punitive damages awards is felt by the consumer who purchases goods and services. *Amici* have a unique understanding of the impact of excessive punitive damage awards inflated by the ill-advised use of wealth evidence.

STATEMENT OF THE CASE

Amici adopt and incorporate Petitioners' statement of the case.

SUMMARY OF ARGUMENT

This case crystallizes the ongoing debate about the constitutional due process issue presented by the use of evidence of a defendant's wealth in assessing the amount of punitive damages. Distinguished judges and scholars have grappled for years with the problems and perceived benefits created by this so-called "traditional" measure of punitive awards. This issue is only becoming more pressing in light of modern mass tort litigation and punitive damages practice and their effects on consumers and businesses throughout the United States. This case provides a unique opportunity for this Court to provide clear guidelines on an important issue – the extent to which evidence of a corporate defendant's wealth can be used to measure an award of punitive damages without violating constitutional due process guarantees.

Particularly in light of the emphasis on the petitioner-defendant's wealth in this case, it is important for this Court to grant certiorari to address the failure by the courts below to comply with this Court's directives regarding the improper use of extraterritorial evidence to support punitive awards in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

For these reasons, the Petition for Writ of Certiorari should be granted.

ARGUMENT

I. INTRODUCTION

This case puts squarely before this Court the constitutional limits for the use of evidence of a corporate defen-

dant's wealth in measuring a punitive damages award. In the instant case, the $9.6 billion net worth of petitioner-defendant Union Pacific Railroad Co. was the ***only*** evidence offered during the punitive damages phase of trial on non-fatal personal injury negligence claims arising out of a railroad crossing accident. An Arkansas jury awarded $5 million in compensatory and $25 million in punitive damages, a 5:1 ratio. The trial court denied the petitioner-defendant's motion for remittitur, explaining that $9.6 billion "is an awful lot of wealth" and you "have to look at [that]." *Ruling on Post-Trial Motions*, Petitioner's Abstract at 48a-49a. The Supreme Court of Arkansas also referenced petitioner-defendant's net worth in upholding the punitive award, stating "there is no doubt that [petitioner-defendant] is in a strong financial and social condition" and that the award constituted only 0.260 percent of its net worth. *Union Pac. R.R. Co. v. Barber*, No. 03-57, *slip op.* at 30 (Ark. Feb. 26, 2004), *available at* 2004 WL 352525; Pet. Abst. at 30a.

In light of the emphasis placed on Union Pacific's net worth, this case also cries out for this Court to enforce its ruling in *Campbell* barring use of out-of-state conduct in setting punitive awards. As well as citing petitioner-defendant's wealth, both the state supreme court and the trial court explained the $25 million punitive award was justified based on proof of petitioner-defendant's alleged participation in an *industry-wide* national "policy" that "put company profits before public safety." *Barber*, *slip op.* at 30, Pet. Abst. at 30a; *see also Ruling on Post-Trial Motions*, Pet. Abst. at 48(a) (trial court explains its reliance on "the proof throughout the trial of concerning policies of the railroad company and their actions."). Evidence admitted to establish this alleged corporate policy during the liability phase of trial included, *inter alia*, expert testimony regarding general railroad industry policies and opinions based on petitioner-defendant's ***national*** filings with government agencies and

policy documents. *See* Pet. Abst. at 42, 126-27, 134, 136. This is precisely the same type of national policy evidence that this Court barred in *Campbell*. It should not have been used to uphold the punitive damages award here.

II. THIS COURT SHOULD PROVIDE GUIDANCE ON THE CONSTITUTIONAL LIMITS OF THE USE OF WEALTH EVIDENCE TO SET PUNITIVE DAMAGES AWARDS.

This Court repeatedly has been asked to reject the use of evidence of a defendant's wealth in the consideration of punitive damages awards. *See, e.g., TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

While thus far declining to hold this use of wealth evidence to be unconstitutional *per se*, this Court and its Members also repeatedly have emphasized the problems inherent in allowing a jury to consider a company's wealth when determining punitive damages: the likelihood of juror bias against large corporations, especially those from out of state;[2] juror attempts at social engineering through the redistribution of wealth from corporations to relatively poorer individuals;[3] unpredictable "windfall" verdicts;[4] and the poten-

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[2] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) ("[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.") (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994)); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 464 (1993) (agreeing that "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident").

tial imposition of undue burdens on interstate commerce and other societal interests.[5]

In light of these very real problems, it would be helpful if this Court could provide specific guidelines on how wealth evidence can be used consistent with constitutional due process protections, if at all. In this case – given that Union Pacific's net worth was the only evidence introduced during

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[3] *TXO*, 509 U.S. at 468 (Kennedy, J., concurring in part and concurring in the judgment) (noting that juries bedazzled by evidence of the size and financial condition of a wrongdoer and feeling "antipathy to a wealthy, out-of-state corporate defendant" may surrender to "redistributionist impulses"); *id.* at 490 (O'Connor, J., dissenting) ("jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously large pool of wealth"); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (jurors, if not properly guided, may "target unpopular defendants ... and redistribute wealth").

[4] *TXO*, 509 U.S. at 490 (O'Connor, J., dissenting) (jury instructions afforded only two objective bases for determination of punitive damages: actual harm, "a relatively small sum on which the jury obviously did not rely," and defendant's wealth, "a factor that obviously impressed the jury a great deal," thus "ensur[ing] that a windfall verdict would result by inviting the jury to redistribute wealth to respondents ... based solely on [defendant's] financial position."); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270-71 (1981) (finding "no compelling reason" to allow punitive damages in Section 1983 cases against municipalities; juror awareness of "the unlimited taxing power of a municipality" may prejudicially impact the size of the award and "the impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial").

[5] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996) ("The fact that BMW is a large corporation ... does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce."); *accord Fact Concerts*, 453 U.S. at 267 ("punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort.").

the punitive phase of trial – wealth evidence was clearly given the maximum role possible. Absent clear guidelines from this Court, evidence of a defendant's financial condition will be used as "an open-ended basis for inflating awards when the defendant is wealthy." *BMW of N. Am. v. Gore*, 517 U.S. 559, 596 (1996) (Breyer, J., concurring).

A. *Use of Wealth Evidence Inevitably Arouses the Passion and Prejudice of the Jury.*

As the Court has observed, "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (footnote omitted). At the same time, the prejudicial impact of evidence of a defendant's wealth on a jury has long been recognized. *See Washington Gas-Light Co. v. Lansden*, 172 U.S. 534, 556 (1899) (reversing verdict rendering compensatory award for which multiple defendants were jointly and severally liable; to do otherwise "might work injustice" as trial court failed to limit use of evidence of sole corporate defendant's wealth to punitive damages issues). In 1931, Professor Clarence Morris, then a Brandeis Research Fellow at Harvard University, wrote:

> The theory is that a penalty which would be sufficient to reform a poor man is likely to make little impression on a rich one; and therefore the richer the defendant is the larger the punitive damage award should be. But it is probable that this very evidence, instead of aiding the jury to assess a proper verdict, may prejudice them against the defendant and prevent an impartial judgment, not only on the size of the verdict, but in deciding who shall win the case. It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare. Such

> evidence may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function.

Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931).

Professor Morris made his prescient comments when punitive damages claims still were brought predominantly against defendant *individuals* for their intentional bad acts toward a specific person, such as assault and battery. Since then, fundamental changes in tort law and punitive damages practice beginning in approximately the 1960s have led to an explosion of punitive damages claims against *businesses* in interstate commerce.[6] As explained by Justice O'Connor, corporations are particularly vulnerable to the misuse of wealth evidence:

> Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. More-

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[6] Such changes in punitive damages practice included the expansion of the remedy to conduct that was not intentional in nature, such as recklessness, willful and wanton misconduct, or even gross negligence, facilitating their award in mass tort litigation. *See* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That has Outlived Its Origins*, 37 Vill. L. Rev. 1117, 1130-38 (1984) (discussing standards of conduct giving rise to punitive damages award). The focus of punitive damages also shifted away from the defendant's alleged wrongful conduct toward the actual plaintiff to its misconduct toward the public at large. For example, while it was difficult to prove a defendant manufacturer marketed and sold a defective product with the conscious intent of injuring a specific plaintiff, it was much easier to establish that the defendant did so recklessly in disregard to the possible harm to potential consumers. *See, e.g., Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 715 (1967) (plaintiff need not prove defendant acted with deliberate intent to harm plaintiff; plaintiff merely had to prove that the defendant acted recklessly and in wanton disregard to the possible harm to others when it marketed, promoted and sold the prescription drug at issue).

> over, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.

TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 464 (1993) (O'Conner, J., dissenting). *See* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that has Outlived its Origins*, 37 Vand. L. Rev. 1117, 1148 (1984) ("Permitting the fact finder to consider evidence of a wrongdoer's wealth is really nothing more than a camouflaged mechanism designed to encourage large punitive assessments. In essence, it is a procedural device that promotes the redistribution of wealth in society.").

The changes in tort law and punitive damages practice made business defendants vulnerable to bankrupting punitive awards in situations where defendant individuals generally were not. These include strict products liability cases, which do not require any misconduct whatsoever by the defendant to establish liability,[7] and the repeated imposition of multiple punitive damages for a single misstep.[8] And while emphasizing the wealth of defendant individuals and businesses

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[7] *See id.* (*Toole* was the first case to find that punitive damages are recoverable in a strict product liability action). Since then, punitive damages awards in product liability cases have proliferated.

[8] As one commentator wrote, "[A] single design error, inadequate warning or recurrent manufacturing mistake can permeate an entire product line, resulting in tens, hundreds or thousands of personal injury lawsuits with accompanying punitive damages claims. Individual awards that appear reasonable can aggregate to threaten the very survival of a business entity." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 142 (1986).

equally upsets the "theory of our government and a cardinal principle of our jurisprudence that the rich and poor stand alike in courts of justice," *Laidlaw v. Sage*, 158 N.Y. 73, 103 (1899), allowing wealth evidence to inflate punitive damages awards against corporate defendants also has adverse practical effects on society.

As plaintiffs' lawyers became more likely to seek punitive damages from corporate defendants perceived to have "deep pockets,"[9] the size and frequency of punitive damages awards "increased dramatically"[10] and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface."[11] Now, multi-million dollar and even billion-dollar punitive damages verdicts have become commonplace.[12] Numerous companies have been

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[9] Ford Motor Company, for example, reported that less than 0.5% of the products liability complaints filed against it prior to 1970 contained claims for punitive damages, while 27.1% of all such complaints in 1980 sought punitive awards. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 54 n.258 (1982). If only personal injury lawsuits are considered, the 1980 percentage is higher. *Id.*

[10] George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982).

[11] Jeffries, 72 Va. L. Rev. at 142. *See also* Peter W. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); Walter K. Olson, THE LITIGATION EXPLOSION (1991); Stephen M. Turner, et al., *Punitive Damages Explosion: Fact or Fiction?* (Wash. Legal Found., Working Paper Series No. 50, Nov. 1992).

[12] This dramatic increase has led one commentator to suggest that "[p]unitive damages have replaced baseball as our national sport." Theodore B. Olson, *Rule of Law: The Dangerous National Sport of Punitive Damages*, Wall St. J., Oct. 5, 1994, at A17. *See* Malcom E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 Ala. L. Rev. 919, 919 (1989) ("Today, hardly a month goes by without a multi-million dollar punitive damages verdict in a product liability case.") (cited by O'Connor, J., dissenting, in *Haslip*, 499 U.S. at 62); Philip Borowsky &

driven into bankruptcy or have been forced to close plants, lay off workers and stop research and production of promising products as a result of excessive punitive damages awards.[13] The ripple effects reach far into a community, adversely affecting other businesses and individuals that rely on the defendant company, shareholders and pension plan investors, and others.

B. Evidence Of The Wealth Of The Defendant Does Not Further The Purposes of Punitive Damages Awards.

Punitive damages are not ordinary civil or tort law damages.[14] Unlike compensatory damages, which provide payment for economic losses (e.g., lost wages and medical expenses) and noneconomic injuries (e.g., "pain and suffering"), punitive damages are not awarded to compensate for a harm.[15] Rather, punitive damages are "quasi-criminal" in

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Jay Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L. Rev. 147, 150 (1983) (noting trend of "juries . . . award[ing] substantial punitive damages with increasing frequency").

[13] *See, e.g.*, Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp. L. Rev. 33, 36-37 (2003) ("catastrophic" effects of asbestos litigation and its accompanying punitive awards include about "seventy companies ... bankrupted, thousands of jobs lost, employee 401(k) plans decimated, and billions of dollars lost to investors"); Bruce N. Kuhlik & Richard F. Kingham, *The Adverse Effects of Standardless Punitive Damage Awards on Pharmaceutical Development and Availability*, 45 Food Drug Cosm. L. J. 693 (1990) ("There is a growing body of evidence that the threat of punitive damages deters the development and marketing of beneficial products.").

[14] *See* Victor E. Schwartz et al., Prosser, Wade and Schwartz's Cases and Materials On Torts, 549-50 (10th ed. 2000).

[15] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (noting that punitive damages "are not compensation for injury ... [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *see also* W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 2, at 9 (5th ed. 1984) (explaining that pu-

nature and "operate as 'private fines' intended to punish the defendant and deter future wrongdoing."[16] Punitive damage awards serve an important social purpose. They allow the public to express its outrage, to punish defendants for reprehensible conduct, and to deter such conduct in the future, where compensatory damages alone in some instances may not adequately serve these objectives.[17]

The criminal law seeks to serve the same purposes as punitive damages: punishment and deterrence. With minor exceptions not relevant here, the criminal law focuses on the wrongdoing of the defendant, not his or her wealth; "a defendant's socio-economic status is never relevant to sentencing." *United States v. Burgos*, 276 F.3d 1284, 1291 (11th Cir. 2001) (quoting *United States v. Burch*, 873 F.2d 765, 769 (5th Cir. 1989); *see* United States Sentencing Commission, *Guidelines Manual*, §5H1.10 (Nov. 2002) (defendant's socio-economic status is "not relevant in the determination of a sentence"). This is true from crimes as minor as a speeding ticket to those as serious as drug dealing. The penalty will focus on how fast the defendant was speeding, not on the size of his pocket book. It will focus on the scope and frequency of the drug dealing, not the wallet size of the dealer.

Members of this Court and other distinguished experts have concluded that the assessment of punitive damages based on the wealth of a defendant – particularly a corporate defendant – actually retards, rather than advances, the re-

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nitive damages are awarded to punish defendant, teach defendant not to "do it again," and deter others from similar behavior).

[16] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) (quoting *Haslip*, 499 U.S. at 19).

[17] *See* Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 50 Hastings L.J. 969, 978-79 (1999).

tributive and deterrent purposes served by this remedy.

A well-respected legal and economics scholar at the Harvard Law School, W. Kip Viscusi, has closely studied the extent to which punitive damages work to deter risky behavior.[18] He concluded that "[s]tates with punitive damages exhibit no safer risk performance than states without punitive damages" and that "there is no deterrence benefit that justifies the chaos and economic disruption inflicted by punitive damages."[19] One reason, he found, is that "when firms look forward, the prospect of punitive damages is so uncertain that there is no deterrent effect."[20] Professor Viscusi also found that jurors base their punitive damage awards less on the defendant's conduct and instructions from the court than on amounts suggested at trial, thus highlighting the impact of emphasizing the defendant's wealth in the jury's consideration of damages.[21] Indeed,

> [t]he degree of admonition – the amount of the judgment in relation to the [defendant's] means – is not ... tied to any concept of what is necessary to deter future conduct nor is there even any way to determine that the jury has considered the culpability of the conduct involved in the particular case.

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[18] *See, e.g.*, W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations*, 87 Geo. L.J. 285 (1998) [hereinafter "Social Costs of Punitive Damages"]; W. Kip Viscusi, *Why There is No Defense of Punitive Damages*, 87 Geo. L.J. 381 (1998) [hereinafter "No Defense of Punitive Damages"].

[19] Viscusi, *Social Costs of Punitive Damages*, at 287, 298.

[20] Viscusi, *No Defense of Punitive Damages*, at 383.

[21] *See* W. Kip Viscusi, *Punitive Damages: How Jurors Fail to Promote Efficiency*, 39 Harv. J. on Legis. 139, 160-63 & n.90 (2002) (finding that providing a jury with an "anchor" value for punitive damages based on a defendant's net worth led to a ten-fold increase in punitive damages).

> Thus the essence of the discretion is unpredictability and uncertainty.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 85 (1971) (Marshall, J., dissenting); *cf. Fact Concerts*, 453 U.S. at 268-69 ("it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality ... the impact on the individual tortfeasor of this deterrence in the air is at best uncertain.").

Proponents of wealth evidence typically argue that it is important to consider in order to assess a large enough punitive award to get the attention of the defendant and deter future misconduct. *See, e.g., Suzore v. Rutherford*, 251 S.W.2d 129, 131 (Tenn. App. 1952) ("what would be 'smart money' to a poor man would not be, and would not serve as a deterrent, to a rich man"). Justice O'Connor recognized in her dissent in *TXO* the possibility that some "might hypothesize that a particularly sophisticated jury would realize that imposing damages in an amount linked to potential harm or the defendant's expected gain might provide appropriate deterrence." *TXO*, 509 U.S. at 486-87.

While this may make sense in determining the appropriate level of punishment for an individual defendant (and it is not clear that it would),[22] commentators are virtually unanimous in the view that a corporate defendant's wealth has no rational connection to the setting of an appropriate penalty. *See, e.g.*, Kenneth Abraham & John C. Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Legal Stud. 415, 421-22 (1989); Robert D.

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[22] *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508-09 (7th Cir. 1992) (Easterbrook, J.) ("'May' ... is an important qualifier; the entire penalty includes extra-judicial consequences, such as a loss of business and other future income, that is likely to be greater for wealthier defendants.").

Cooter, *Punitive Damages for Deterrence: When and How Much*, 40 Ala. L. Rev. 1143, 1176-77 (1989); *Symposium Discussion, Punitive Damages*, 56 S. Cal. L. Rev. 155, 190-91 (1982) (comments by Professors Jack L. Carr and Malcolm E. Wheeler).

This is why. "Corporations ... are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business." *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (Easterbrook, J.). "Corporations as such feel no utility or disutility associated with increases or decreases in wealth." Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 Ala. L. Rev. 741, 824-26 (1989). In reality, investors, including individual investors and pension trusts and mutual funds that aggregate the investments of millions of average persons, are the true payors of punitive awards as they see the value of their shares decrease. *Zazu Designs*, 979 F.2d at 508.

Professor Viscusi has taken a similar view:

> Corporate entities are not children or criminals who need to be punished. They are institutions. Punitive damages inflict harm on current shareholders, customers, and employees. None of these individuals may have even been involved in the original safety decision. For long-term risks, such as asbestos, the economic players today are quite different from those who made the risk decisions decades ago at the time of exposure. Even for contemporaneous risks, it is not easy to locate the responsible employee for a large institution's actions. Even if the responsible employee is identified, that individual will not suffer the full effects of the punitive damages award. The employee can simply quit his job, thus limiting the institution's ability to sanction him.

> The result is that innocent people who are not responsible for the risk decision nonetheless will suffer the economic sanction.

W. Kip Viscusi, *Why There is No Defense of Punitive Damages*, 87 Geo. L.J. 381, 383 (1998) (internal citation omitted). As a result, "a corporation's wealth is not a meaningful proxy for the wealth of its ultimate owners who are the real principals in the principal-agent relationship." Chapman & Trebilcock, 40 Ala. L. Rev. at 824-25. Jurors, however, are not told this

Moreover, corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law. "Net worth is a measure of profits that have not yet been distributed to the investors. Why should damages increase because the firm reinvested its earnings?" *Zazu Designs*, 979 F.2d at 508. The absolute size of a corporate defendant is also a questionable reason to inflate punitive awards:

> Awards of ordinary damages in [individual cases] deter wrongful conduct. The net judgment bill of the firm will increase with its wrongs, without the need for punitive damages. If a larger firm is more likely to commit a wrong on any given transaction, then its total damages will increase more than proportionally to its size without augmentation in any given case; if a larger firm is equally or less likely to commit a tort per transaction, then the court ought to praise the managers rather than multiply the firm's penalty. Consider: General Motors is much larger than Chrysler, and so makes more defective cars, but the goals of compensation and deterrence are achieved for both firms by awarding as damages the injury produced per defective car.

Id. at 508-09.

In sum, in light of the societal problems caused by punitive damages "run wild"[23] under 21st Century punitive damages practice, "tradition" seems a weak rationale for allowing the unrestrained use of wealth evidence to influence the amount of punitive damages awards – particularly in light of scholarship showing that use of wealth evidence fails to further the purpose of punitive damages awards. Admittedly, excessive punitive damages have not been caused exclusively by the use of wealth evidence. This Court, though, already has set forth clear constitutional guidelines addressing other contributing factors, such as the inappropriate use of out-of-state conduct and conduct towards others, lack of proportionality, failure to provide adequate judicial review, and the like. *See Campbell*, 538 U.S. 408; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Gore*, 517 U.S. 558; *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Similar clear and understandable guidelines are sorely needed with regard to the use of wealth evidence.

III. CERTIORARI IS NECESSARY TO ENFORCE THIS COURT'S RULE BARRING CONSIDERATION OF OUT-OF-STATE CONDUCT IN AWARDING PUNITIVE DAMAGES.

This Court explained in *Campbell* that when wealth evidence is introduced on punitive issues:

> our concerns are heightened when the decision-maker is presented ... with evidence that has little bearing as to the amount of punitive damages that should be awarded.

Campbell, 538 U.S. at 418 (noting in such cases that strong

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[23] *Haslip*, 499 U.S. at 18.

guidelines are needed to "aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.").

That is precisely what occurred in this case. In an attempt to establish culpability, plaintiffs launched a broad attack on nationwide corporate "policies" of Union Pacific (and the entire railroad industry) to put profits over safety. *See* Pet. Brief at 4-5. In other words, just as in *Campbell*, "this case was used as a platform to expose, and punish, the perceived deficiencies of [defendant's] operations throughout the country." 538 U.S. at 421. This "scheme" argument is available, at least in theory, in virtually any case against a business defendant. Since corporations owe their shareholders a fiduciary duty to try to make profits, it should surprise no one that many of their activities in our free enterprise system are aimed at furthering that objective. Under *Campbell*, of course, this type of argument is prohibited. *Id.* at 421, 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

Unfortunately, both the trial court and the Arkansas Supreme Court relied on Union Pacific's alleged nationwide "policies" when upholding the punitive award. Each ruling by itself makes it clear that Union Pacific "was being condemned for its nationwide policies rather than for the conduct directed toward the [plaintiffs]." *Id.* at 421-22. The trial court explained that its decision relied on the proof of these "policies" admitted throughout trial. *See Ruling on Post-Trial Motions*, Pet. Abst. at 48(a). The Arkansas Supreme Court explained that it found that the element of "malicious intent" required to support punitive damages under Arkansas law was satisfied by "the record in this case [which] reflects the development of a corporate policy at Union Pacific that put company profits before public safety." *Barber, slip op.* at 30, Pet. Abst. at 30a. This alleged corpo-

rate policy was supported by expert opinion testimony, *id.*, which was based on information about railroad industry practices generally, as well as national information specific to Union Pacific.

This is in direct contravention of this Court's ruling in *Campbell* that "a State cannot punish a defendant for conduct that may have been lawful where it occurred. Nor does the State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of its jurisdiction." 538 U.S. at 421-22. While the Arkansas Supreme Court purported to apply *Campbell* in its reprehensibility analysis, *see id.* at *12, it ignored this Court's directives about punishing a defendants for its extra-territorial conduct. To avoid injustice in this case and send a message to courts that may misunderstand the directives in *Campbell*, this Court should grant the Petition for Certiorari.

CONCLUSION

For the foregoing reasons, *amici curiae* the American Tort Reform Association and the National Association of Manufacturers request that this Court grant the Petition for a Writ of Certiorari in this action.

Respectfully submitted,

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